

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-210183

DATE: August 25, 1983

MATTER OF: Consolidated Industries, Inc.

DIGEST:

1. Protest of allegedly restrictive specifications and delivery schedule is untimely and not for consideration where filed after closing date for receipt of initial proposals.
2. Where protester alleges that agency provided information and equipment to competitor to help competitor develop a product used by the agency, thereby giving competitor an unfair advantage, but agency states that it provided only what was appropriate under prior contracts and agency's version of what occurred is as plausible as the protester's, the protester has not sustained its burden of establishing that agency acted improperly.
3. Agency does not give a firm an unfair competitive advantage when, at firm's request, it conducts preprocurement tests on the firm's equipment to determine whether that equipment meets its minimum needs and no other firm makes similar request.
4. Award may be made without discussions where there is adequate competition so as to ensure that acceptance of the most advantageous proposal without discussions will result in a fair and reasonable price, provided the solicitation advises offerors of the possibility that award may be made without discussions. Where solicitation contains the required notice and provides for award primarily on basis of price and two acceptable offers are received, agency's decision to award a contract on the basis of initial proposals is not legally objectionable in the absence of proof that the decision reflects bias in favor of a particular firm.

026483

Consolidated Industries, Inc. protests the proposed award of a contract to PDC, Inc. under request for proposals (RFP) No. DAAH01-82-R-0967, a 100-percent small business set-aside, issued by the U.S. Army Missile Command, Redstone Arsenal, Alabama, for 10 cable testers and associated input-output cables. Consolidated essentially contends that the Army improperly helped PDC develop a prototype cable tester and then restricted competition to ensure that PDC would receive the contract. The Army reports that PDC may have gained a competitive advantage from performing previous related contracts, but maintains that the firm did not gain an advantage as a result of unfair Government action.

We deny the protest in part and dismiss it in part.

The Army received three proposals, including one from PDC and one from the protester, on the November 22, 1982 closing date for receipt of initial proposals. The solicitation did not provide for a technical evaluation; it merely provided that award would be made to the offeror whose proposal was "most advantageous to the Government, price and other factors considered." The Army found one of the proposals to be unacceptable because of a nonconforming delivery schedule. The agency, without conducting discussions, then concluded that PDC, the low offeror, was the apparent successful offeror. The Army has withheld the award pending our decision on this protest.

Consolidated contends that the Army gave PDC an unfair competitive advantage by providing it technical assistance and information not available to others prior to issuance of the solicitation. PDC also contends that the specifications and the relatively short delivery schedule included in the solicitation were tailored to PDC's tester. The protester also argues that the agency's failure to conduct discussions, request the submission of best and final offers, and require the submission of separate technical proposals substantiates its position that the entire procurement was rigged to favor PDC's recently developed tester.

Consolidated's argument that the solicitation's specifications and delivery schedule were unduly restrictive and favored PDC is untimely and we will not consider it. Our Bid Protest Procedures require that protests alleging

defects which are apparent on the face of a solicitation be filed prior to the time for the receipt of initial proposals. 4 C.F.R. § 21.2(b)(1) (1983). The nature of the specifications and the delivery schedule were evident from the face of the solicitation; thus, to be timely, Consolidated should have protested these matters by the November 22 closing date. Its protest was not filed until December 15 and therefore we will not consider this part of the protest. Holm Well Drilling, Inc., B-207774, October 22, 1982, 82-2 CPD 362.

In support of its contention that the Army gave PDC an unfair advantage in competing for the contract, Consolidated points to four different ways the Army allegedly aided PDC and offers the affidavits of its president and of a former employee of PDC who worked on developing that firm's prototype cable tester. First, the protester states that the Army improperly provided PDC with advance information pertaining to its technical needs prior to the issuance of the solicitation. In this respect, the former PDC employee states that Army representatives attended meetings at PDC and after these meeting PDC officials would give him instructions for his work on the prototype tester it was developing during 1981 and 1982. According to this individual, these instructions were "usually in the form of statements relative to the government's wants and wishes for a cable tester." Second, Consolidated alleges that the Army improperly provided PDC with materials which helped PDC develop its prototype. The former PDC employee states that 5 weeks after he informed an Army official over the telephone of the four types of cable connectors necessary for PDC to complete development of its cable tester, the requested items arrived. He "believe[s] they were supplied by the U.S. government." He also states that the Army furnished PDC with a Glenair VJ-2000 cable tester which aided PDC's development of a prototype and which, according to Consolidated's president, was unnecessary for performing the other contracts PDC had with the Army. Third, Consolidated alleges that the Army allowed PDC to charge the cost of developing its prototype tester to the Army under other Army contracts held by PDC even though this work was outside the scope of those contracts. The former PDC employee states that he charged the time he spent on the prototype project to Army task orders under those contracts. Fourth, Consolidated alleges that the Army allowed PDC to test its prototype at Redstone Arsenal without giving any of the other firms similar courtesies.

The Army reports that PDC worked on cable adapter test sets pursuant to orders issued under two time and materials contracts PDC held with the Army, and that these cable adapters were to be used in conjunction with the Glenair cable tester¹ during testing of Missile Launch Rocket System (MLRS) cables. The Army denies, however, that it exhibited any unfair action or preference in favor of PDC.

Specifically, the Army states that the only information provided to PDC was that necessary for PDC to perform its contracts for the fabrication of the cable adapter test sets to be used with the agency's Glenair testers. It acknowledges that its representative did hold meetings at PDC's facility, but states that the meetings concerned the cable adapter contracts and the Army representative attending these meetings was the technical monitor for those contracts. It also asserts that the only materials provided to PDC were Government Furnished Property (GFP) for use in performing the cable adapter contracts. The Army denies providing cable connectors identified in the former PDC employee's affidavit for the purpose of helping PDC develop a prototype tester. It states that the connectors specified by PDC have model numbers similar to connectors which it provided as GFP for the fabrication of the cable adapters and suggests that the connectors received were actually the connectors provided as GFP under those contracts. Further, it adds that the Glenair cable tester was provided as GFP so that PDC could test the adequacy of the cable adapters developed pursuant to these contracts and notes that in any event the Glenair model was available commercially. As to the charges for work on the prototype, the Army denies that PDC's prototype development costs were being charged to the contracts it had with PDC for cable adapter test sets. The technical monitor of those contracts states that to the best of his knowledge the costs charged to the contracts by PDC were appropriate and for work specified in task orders. Moreover, the Army reports that the contracting officer examined the vouchers

¹ The Glenair cable tester is the item which the Army had been using to perform its support maintenance for the last few years. In fact, the agency had in May 1982 preliminarily decided to purchase more of the Glenair testers on a sole-source basis.

submitted by PDC against the orders issued and did not discover any erroneous charges. Finally, the Army states that PDC was the only firm that requested permission to test its prototype at Redstone and that it views such testing as a proper and appropriate way to expand potential sources for an item.

On this record, we are unable to conclude that PDC was the beneficiary of any improper or unfair action by the Army. What is clear is that from July 1981 to July 1982 PDC designed, developed and provided cable adapter test sets under two time and materials contracts with the Army, that concurrently PDC was developing a prototype cable tester, and that PDC's work on the cable adapters under its Army contracts and that firm's development work on its own cable tester were interrelated. It is also clear that the Army supplied PDC with drawings, cable connectors and a Glenair tester, which the Army categorizes as GFP under the cable adapter contracts. What is not clearly established is that the Army went beyond what was appropriate under the PDC contracts and provided additional, improper assistance to help PDC develop its own tester. While the former PDC employee states his version of what occurred, Army officials, referring to essentially the same facts, explain those facts differently. We cannot ignore the Army's statements, see Greyhound Airport Service, Incorporated, B-182159, April 10, 1975, 75-1 CPD 219, particularly since the Army's version of what occurred is as plausible as the protester's version. Thus, with respect to the information and equipment provided to PDC, we do not believe that the protester has affirmatively demonstrated that PDC was unfairly assisted through a deliberate effort on the part of agency personnel. See American Marine Decking Systems, B-203748, July 8, 1981, 81-2 CPD 23.

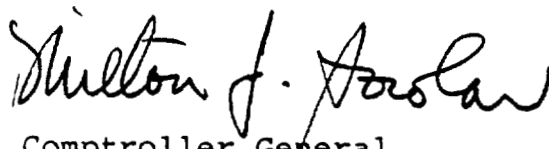
Similarly, regarding Consolidated's claim that PDC improperly charged its development effort to the contracts for the cable chapters, the protester simply has not established that the Army knowingly permitted this to happen. The Army's technical monitor and a contracting officer both indicate they are unaware of any impropriety in PDC's billings. Even if PDC did improperly charge some of its development work to the existing contracts, as alleged by the former PDC employee, unless this was evident or should have been evident to the Army, the Army's approval of PDC's vouchers does not constitute unfair action such that Consolidated can complain about it in the context of this procurement. There is, of course, no evidence proffered by Consolidated which indicates that the Army knew or should have known of improper PDC billing.

As far as the agency's testing of PDC's prototype is concerned, it is appropriate for an agency to conduct pre-procurement tests to determine whether existing products meet the Government's minimum needs or to assist firms in developing items to meet those needs. Maremount Corporation, 55 Comp. Gen. 1362 (1976), 76-2 CPD 181. Since the Army tested PDC's unit to see if it met its needs, such a test was proper. Consolidated complains that neither it nor any other firm was provided such a courtesy. The record shows that PDC requested that its unit be tested and that neither Consolidated nor any other firm made a similar request. Consequently, we see no basis for Consolidated's complaint in this regard.

As for the Army's failure to hold technical discussions or to request best and final offers, in negotiated procurements, an agency may make award without discussions when there is adequate competition so as to ensure that award without discussions will result in a fair and reasonable price and the solicitation advises offerors of the possibility that award might be made without discussions. Todd Logistics, Inc., B-203808, August 19, 1982, 82-2 CPD 157. Here the solicitation contained the appropriate notice and provided for award primarily on the basis of price, and two acceptable offers were received. Under these circumstances, the agency's decision to award a contract on the basis of initial proposals is not subject to objection in the absence of strong evidence that the agency's actions resulted from favoritism toward PDC. Consolidated has offered no evidence in support of its bare allegation, however; consequently, we find this allegation to be without merit.

Finally, we note Consolidated's contention that PDC does not offer a commercial unit that could be purchased off-the-shelf and that its only unit is that one developed with the Army's assistance. The simple answer to this contention is that there is no solicitation requirement that the unit offered be commercially available.

We deny the protest in part and dismiss it in part.

for 
Comptroller General
of the United States